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The dissenters ¹¹ argue for uniformity. So does the majority. Whereas the former ask for uniformity among all federal courts across the nation, the latter, by holding the line with *Erie*, has maintained uniformity within each jurisdiction. So long as state laws differ, only one kind of uniformity can be attained, and the other must be compromised. To argue for either is to re-fight the *Erie* battle. Most of the "exceptions" to the *Erie* doctrine have been created in situations involving the United States as a party or a federal statute.¹² Since these are really more analogous to the federal question area, the problem of divergency between state and federal court decisions usually does not arise due largely to the absence of the former.¹³

Would the dissenters have us return completely to the rule of *Swift v. Tyson*?¹⁴ The majority admits the applicability of the *Clearfield* rule to suits in which the United States is not a party where interests of a federal character are involved, ¹⁵ but they assert that it does not apply to the type of question of burden of proof presented here. And, if one believes in the soundness of *Erie R. R. v. Tompkins*, their decision is correct.

FRANK M. DUNBAUGH, III.

CONSTITUTIONAL LAW—MILITARY COURTS— JURISDICTION OVER DEPENDENTS OF MILITARY PERSONNEL

Petitioners, wives of military personnel living with their husbands outside the territorial limits of the United States, were tried and convicted by military general courts-martial for the murders of their husbands.¹ Each

11. It is interesting to note that the two dissenters, Mr. Justice Douglas and Mr. Justice Black were the authors of the *Clearfield* opinion and the *National Metropolitan Bank* opinion, respectively. Mr. Justice Frankfurter, who wrote the majority opinion in the *Parnell* case, and Mr. Justice Reed, who concurred, also took part in the two earlier decisions which were rendered without dissent.

12. See note 4 *supra*.

13. "While the United States may sue in state courts, it cannot ordinarily, in the absence of a permissive statute, be sued in a state court. . . ." 91 C.J.S. *United States* § 190 (1955). However, in the Tables of Cases of the December 1956 issue of the General Digest, all 155 cases in which the United States was a named party were listed as federal court cases. In the cases involving a federal statute, uniformity can easily be maintained because once it has been interpreted by the United States Supreme Court, the state courts as well as the federal are bound to follow. *United States v. Gilbert Associates, Inc.*, 345 U.S. 701 (1953).

14. 16 Pet. (U.S.) 1 (1842).

15. "We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties. . . . Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves." — U.S. —, 77 Sup. Ct. 119, 121, 122 (1956).

1. Art. 118, Uniform Code of Military Justice, 50 U.S.C. § 712 (1952). Section 712. Murder (article 118). Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

1. has a premeditated design to kill; or

petitioned for the issue of writs of habeas corpus in United States District Courts² to test the constitutionality of Article 2(11) of the Uniform Code of Military Justice.³ *Held*, in a single hearing of both cases, petitioners were not entitled to trial by Article III courts while outside the territorial limits of the United States and that they were subject to the jurisdiction of Article 2(11) of the Uniform Code of Military Justice. *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956).

There is no constitutional provision which specifically gives or denies United States federal courts the power to punish citizens for offenses committed outside the territorial limits of the United States. Jurisdiction over extra-territorial offenses must be obtained by congressional legislation⁴ and from the executive power to make treaties and agreements with foreign sovereignties.⁵ It is well settled that Congress may establish legislative courts outside the territorial limits of the United States.⁶ These courts may be either the product of congressional power "to make all needful rules and regulations, respecting the territory, or other property, belonging to the United States"⁷ or of the treaty power; they are not judicial courts as set

2. intends to kill or inflict great bodily harm; or

3. is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or . . .

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this section, he shall suffer death or imprisonment for life as a court-martial may direct. May 5, 1950, ch. 169, § 1, 64 STAT. 140).

2. In *Kinsella v. Krueger*, the writ was discharged by the District Court for the Southern District of West Va. 137 F. Supp. 806 (1956). An appeal was taken to the United States Court of Appeals for the 4th Circuit and the government sought certiorari while this appeal was pending. *Cert. granted*, 350 U.S. 986 (1956). In *Reid v. Covert*, the writ was issued by the District Court for the District of Columbia and the government appealed directly to the United States Supreme Court which postponed hearing until the *Kinsella* case would be heard. 350 U.S. 985 (1956).

3. Art. 2(11), Uniform Code of Military Justice, 50 U.S.C. § 552 (1952). Section 552. Persons subject to this chapter (article 2). The following persons are subject to this chapter:

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands. . . .

4. See *Blackmer v. United States*, 284 U.S. 421 (1932).

5. There are international agreements applicable to the instant cases. These are the sort of agreements referred to in Art. 2(11) of the Uniform Code of Military Justice. See note 3 *supra*. Applicable in *Kinsella v. Krueger* was Administrative Agreement With Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3342, T.I.A.S. 2492. Applicable in *Reid v. Covert* was Agreement With The United Kingdom, July 27, 1942, 57 STAT. 1193, E.A.S. No. 335. Both agreements are substantially provisions for the exercise of U.S. military jurisdiction over persons committing offenses in the respective countries with whom the agreements were made.

6. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 158 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Ross v. McIntyre*, 140 U.S. 453 (1891); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 510 (1828).

7. U.S. CONST. art. IV, § 3, cl. 2.

out in Article III of the Constitution. Unlike Article III courts, legislative courts, whether territorial or created by treaty, are not bound by constitutional requirements and provisions such as trial by jury⁸ or indictment by grand jury.⁹ Congressional power to provide for trial and punishment of military and naval offenses is independent of Article III of the Constitution defining the judicial power of the United States.¹⁰ Courts-martial are authorized by Congress pursuant to its power "to make Rules for the Government and regulation of the land and naval Forces. . . ." ¹¹

There were virtually no problems involving jurisdiction over the dependents of military personnel accompanying the armed forces abroad until the years following World War II. In 1916, Congress revised the Articles of War so that under certain circumstances "... persons accompanying or serving with the Armies of the United States . . ." ¹² were made amenable to court-martial jurisdiction. The cases that arose out of this provision involved civilians who were in some manner connected to the armed forces by virtue of their occupations or professions.¹³ The Supreme Court was never called upon to rule on the constitutionality of Article 2(d) of the Articles of War; but in *Madsen v. Kinsella*,¹⁴ where a dependent-wife who murdered her army-husband was tried and convicted by the United States Military Court for Germany, the Supreme Court found that the wife was subject to military court jurisdiction as "a person accompanying the armed forces."¹⁵ In the recent *Toth* case,¹⁶ analagous to the instant cases in that the defendant was a civilian, the Court, in declaring unconstitutional Article 3(a) of the Uniform Code of Military Justice,¹⁷ ruled

8. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 158 (1904).

9. *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

10. *Carter v. Woodring*, 92 F.2d 544 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 752 (1937); *Ex parte Potens*, 63 F. Supp. 582 (D.C. Va. 1943).

11. U.S. CONST. art. I, § 8, cl. 14.

12. Articles of War, art. 2(d), Aug. 29, 1916, c. 418, § 2308a, 39 STAT. 651.

13. *Perlstein v. United States*, 151 F.2d 167 (3rd Cir. 1945) (civilian employee of contractor engaged in army salvage project in Africa); *Grewe v. France*, 75 F. Supp. 433 (E.D. Wisc. 1948) (engineer with United States Forces in Germany); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944) (merchant seaman on vessel accompanying military convoy); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943) (civilian cook on vessel loading military supplies); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex. 1919) (one serving with troops as superintendent quartermaster corps); *Ex parte Falls*, 251 Fed. 415 (D.C. N.J. 1918) (civilian cook employed by quartermaster on ship carrying military supplies); *Ex parte Gerlach*, 247 Fed. 616 (S.D. N.Y. 1917) (civilian seaman carried to United States aboard army transport volunteered for duty and then refused to obey orders).

14. 343 U.S. 341 (1952).

15. *Id.* at 361.

16. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

17. Art. 3(a), Uniform Code of Military Justice, 50 U.S.C. § 553 (1952). Section 553. Jurisdiction to try certain personnel (article 3).

(a) Subject to the provisions of section 618 of this title, any person charged with having committed, while in a status in which he was subject to this chapter, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

that Toth, a discharged serviceman, could not be tried by a court-martial for a crime which he had committed while in the service.¹⁸

In the instant cases the Court found that petitioners could be tried by legislative courts and that it was "reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose."¹⁹ The Court further declared that having determined this, ". . . we have no need to examine the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces. . . .'"²⁰ Mr. Justice Frankfurter, in an opinion of reservation, expressed difficulty in seeing in what manner the Court's two main bases for their decision—the establishment of legislative courts for the governing of territories and the establishment of consular courts in oriental countries to prevent American citizens from being subjected to "barbarous and cruel punishments" common in those countries at one time—had any bearing on the instant problem.²¹

In view of the fact that Congress may establish legislative courts and may also make rules to regulate the armed and naval forces, it would seem at first blush that the Court's rulings in the instant cases are reasonable and consistent. However, in considering a long history of protection of individual rights in accordance with constitutional guarantees for citizens of the United States, it does not seem to have been within the contemplation of the framers of the Constitution that Congress would draw from two distinctly different articles to create a power which never seems to have been intended. Courts-martial are the product of power to govern the *military* and even by the application of the most elastic standards, no constitutional justification can be shown for the application, during peacetime, of their jurisdiction over dependents of military personnel. These persons are simply *not* "members or part of the armed forces." The *reasons* for the Court's ruling are clear.²² The constitutional source from which

18. The Court attached great importance to the difference between Article III courts and courts-martial. ". . . given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." (emphasis added). *United States ex rel. Toth v. Quarles*, 35 U.S. 11, 15 (1955).

19. *Kinsella v. Krueger*, 351 U.S. at 478 (1956).

20. *Ibid.*

21. *Id.* at 483; *Reid v. Covert*, 351 U.S. at 492 (1956).

22. The Court footnotes reasons for its decision which seem more consistent with a rationalization for expediency than an affirmative declaration of the law. They describe ". . . the disruptive effect of establishing another type of legislative court to deal with the same type of offenses in the same territorial jurisdiction as the military tribunals. In cases of conspiracy or joint crime, parallel trials would have to be held in separate courts. Since the trials could not proceed at the same time, one would of necessity precede and influence the other, and results could understandably be disparate." *Kinsella v. Krueger*, 351 U.S. 470, 477, note 7 (1956). Why the Court should cling to this particular problem as a reason for its decision is not clear when trials of singular causes are now often held in criminal and civil courts with results reached which are certainly "disparate". The Court goes on to reject as impractical, and understandably so, the suggestion that citizens be returned to the United States for trial. They follow this by saying that the

Congress derived its power to legislate in this manner is not clear. The Court said in the *Toth* case, "There can be no valid argument, therefore, that civilian ex-servicemen must be court-martialed or not tried at all. If that is so, it is only because Congress has not seen fit . . . [to act]."²³ This same reasoning if applicable to ex-servicemen like *Toth* who actually did commit crimes while under military jurisdiction, seems to be applicable also to citizens whose only connection with the armed forces is by the mere fortune of being dependents of military personnel. There is no doubt that Congress can and should establish courts with jurisdiction over the military-dependent class abroad. However, it would seem that courts-martial are not constitutionally proper for that purpose.*

HARVEY I. REISEMAN

CONSTITUTIONAL LAW—SHERMAN ACT— CROSS-ELASTICITY IN DETERMINING PERCENTAGE OF MARKET CONTROL

The Attorney-General brought anti-trust proceedings against the defendants, producers of 75% of all available cellophane sold in the United States, relying on Sec. 2 of the Sherman Act, which prohibits "Every . . . combination . . . in restraint of trade or commerce among the several states." The District Court denied the petition. *Held*, on appeal, affirmed (4-3). The Supreme Court declared that merely producing such a percentage of the market does not constitute a monopoly in restraint of trade. *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956).

The issue resolved in the instant case, that control of an overwhelming amount of the market does not constitute monopolistic power, is an official pronouncement of the adoption of a new interpretation of the Sherman Act. Size of the company in comparison with the rest of the industry had been the established rule when the size carried with it a possibility of abuse of power.¹ This was the determinative test used by the courts when predatory

only alternatives to this course of action are either to allow citizens to stand trial by foreign jurisdictions or not be tried at all. The inconsistency of this rationale is readily seen by comparison with the Court's remark in the *Toth* case quoted at note 23 in this text.

23. *United States ex rel. Toth v. Quarles*, 35 U.S. 11, 21 (1955).

*This note was begun in October of 1956. On November 5, 1956 the court agreed to rehear both cases noted here. Counsel were invited to discuss or reargue the practical necessities for or alternatives to court-martial jurisdiction over civilian dependents overseas, historical evidence bearing on the scope of such jurisdiction, relevance of distinctions between dependents and civilians employed by the armed forces, and relevance of distinctions between major and petty offenses. See 25 U.S.I. Week 3136 (Nov. 6, 1956) (Nos. 701, 713).

1. *American Tobacco Co. v. United States*, 328 U.S. 781, 796 (1946). Defendants produced 63% of all smoking tobacco, 68% of all domestic cigarettes, 44% of chewing tobacco in 1939. ". . . comparative size on this great scale inevitably increased the power of these three to dominate all phases of the industry." *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).